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CRIMINAL LAW ISSUES

WALLACE v. STATE, No. 46S03-0107-CR-331, ___ N.E.2d ___ (Ind. Aug. 16, 2001).
RUCKER, J.

Following his 1999 jury trial, Anthony Wallace was convicted of three counts of child molesting as Class C felonies for the 1988 and 1989 molestations of his daughters and sentenced to an aggregate term of twelve years. On review, the Court of Appeals affirmed the trial court in a memorandum decision. Wallace v. State, No. 46A03-0002-CR-56 (Ind. Ct. App. July 31, 2000). Wallace raises several issues on transfer, one of which we find dispositive: was his prosecution for these offenses barred by a five-year statute of limitations. We grant transfer and reverse Wallace's convictions.

. . . .

Wallace contends the statute of limitations barred the State from prosecuting him on all three counts of child molesting as Class C felonies because the acts allegedly occurred between July 1, 1988 and October 30, 1989. According to Wallace, the applicable statute of limitations provides that prosecution for a Class C felony must be commenced within five years of the alleged offense. See Ind. Code § 35-41-4-2(a)(1) (1998). Wallace was not charged until March 1998, more than five years after the alleged acts.

There are two important legal principles at the heart of our discussion. First, the applicable statute of limitations is that which was in effect at the time the prosecution was initiated. [Citations omitted.] [Footnote omitted.] Second, the statute to be applied when arriving at a proper criminal penalty is that which was in effect at the time the crime was committed. [Citation omitted.]

Here, between the date of the alleged offenses and the time Wallace was charged, the statute of limitations was amended to allow prosecution for certain classes of child

molesting to be commenced at any time before the alleged victim reaches thirty-one years of age. The statute provides in relevant part:

> (a) Except as otherwise provided in this section, a prosecution for an offense is barred unless it is commenced:
> (1) within five (5) years after the commission of a Class B, Class C, or Class D felony; . . .
> (c) A prosecution for the following offenses is barred unless commenced before the date that the alleged victim of the offense reaches thirty-one (31) years of age:
> (*1) IC 35-42-4-3(a) (Child molesting)*.

I.C. § 35-41-4-2 (1998) (emphasis added). [Footnote omitted.]

At the time of the alleged offenses in this case, child molesting under Indiana Code section 35-42-4-3(a) (1988) involved sexual conduct with a child under twelve years of age and was punishable as a Class B felony. However, the State did not charge Wallace under Indiana Code section 35-42-4-3(a). This was apparently so because at the time the crimes were allegedly committed T.W. and R.W. were ages twelve and thirteen respectively, and as such they exceeded the age limitations set forth in Indiana Code section 35-42-4-3(a). Rather, the State charged Wallace with Class C felony child molesting under Indiana Code section 35-42-4-3(c) (1988), which involved sexual conduct with a child between the ages of twelve and fifteen. As such, Wallace was subject to the five-year statute of limitations in Indiana Code section 35-41-4-2(a)(1).

. . . .

The State acknowledges that Wallace was convicted under Indiana Code section 35-42-4-3(c) yet counters that the extended statute of limitations in Indiana Code section 35-41-4-2(c)(1) nevertheless applies because an ambiguity exists when Indiana Code section 35-41-4-2 is read as a whole. However, the statute of limitations must be construed narrowly and in a light most favorable to the accused. [Citation omitted.] . . .

. . . .

SHEPARD, C. J. and SULLIVAN, J., concurred.

BOEHM, J., filed a separate written opinion in which he dissented, and in which DICKSON, J., concurred, in part, as follows:

I agree with the majority that the five-year limitations period set forth in Indiana Code section 35-41-4-2(a)(1) applies, and therefore the State's claim against Wallace was stale. For many years, this state has followed the rule that a statute of limitations defense was not waivable. I believe both the current Trial Rules and policy considerations dictate that a defendant waives a statute of limitations defense by failing to raise it in the trial court. Accordingly, I would affirm the trial court.

. . . .

HOLLOWELL v. STATE, No. 49S00-9912-CR-688, ___ N.E.2d ___ (Ind. Aug. 20, 2001).

SULLIVAN, J.

Defendant contends that he was unfairly prejudiced during the habitual offender stage when the trial court admitted, over his objection, the chronological case summary (trial court docket) from a prior conviction.

. . . .

After the jury's verdict in the guilt phase of this case, but prior to the habitual phase, Defendant stipulated to the two predicate felonies charged by the State in the habitual offender count. . . .

The evidence admitted without objection consisted of the charging information for each of Defendant's prior convictions. For the first conviction, the information indicated that the

State charged Defendant of burglary and theft. The information for the battery conviction indicated that he had been charged initially with attempted murder.

As noted, the evidence that was admitted over Defendant's objection consisted of the case chronology with respect to the battery conviction. A thorough reading of the chronology indicates that Defendant was charged initially with attempted murder but subsequently pled guilty to and was convicted of battery. [Footnote omitted.] . . .

. . . .

Defendant notes that we have stated in the past that stipulations by both parties may limit facts in issue, and consequently, admissibility of evidence relevant to establishing those facts. See Butler v. State, 647 N.E.2d 631, 634 (Ind. 1995). Here, however, evidence of his prior convictions was still relevant even after Defendant's stipulation.

So long as done so consistent with applicable rules of evidence, evidence of the two predicate felonies in the face of a stipulation is admissible during the habitual offender stage of a trial. In the habitual offender stage, the jury has discretion to determine whether a defendant is a habitual offender "irrespective of the uncontroverted proof of prior felonies." Seay v. State, 698 N.E.2d 732, 737 (Ind. 1998). Because "the jury is the judge of both the law and facts as to that issue," see id., the facts regarding the predicate convictions are relevant to the jury's decision whether or not to find a defendant to be a habitual offender.

We also find no prejudice from the inclusion of the case chronology. Although there was a mistake on the judgment order with respect to the prior battery conviction, we find no error. . . .

. . . .

SHEPARD, C. J. and BOEHM, J., concurred.

RUCKER, J., filed a separate written opinion in which he dissented, in part, he concurred, in part, and in which DICKSON, J., concurred, as follows:

Even though Hollowell stipulated to the predicate offenses underlying the habitual offender allegation, the State nonetheless proceeded to introduce the case chronology into evidence. The majority condones this procedure because "the facts regarding the predicate convictions are relevant to the jury's decision whether or not to find a defendant to be a habitual offender." Slip op. at 10 (citing Seay v. State, 698 N.E.2d 732, 736-37 (Ind. 1998)). I disagree. Because of Article 1, Section 19 of the Indiana Constitution, the jury is empowered to render a verdict that a defendant is not a habitual offender even if it finds that the State proved beyond a reasonable doubt that the defendant had accumulated two prior unrelated felonies. Seay, 698 N.E.2d at 734. This right of an Indiana jury in a criminal case not to be bound to convict even in the face of proof beyond a reasonable doubt allows the jury to consider mercy in its deliberations. [Citations omitted.] Any consideration of mercy in this case was very likely eliminated by the erroneous and prejudicial information contained in the case chronology. Therefore, I would reverse the habitual offender adjudication. In all other respects I concur with the majority.

TAPIA v. STATE, No. 45S03-0011-PC-708, ____ N.E.2d ___ (Ind. Aug. 20, 2001).

SULLIVAN, J.

Acting pro se, Tapia asked for an evidentiary hearing on his claims and the post-conviction court scheduled a hearing for May 20, 1997. On May 1, Tapia filed a motion to continue the hearing and a motion to amend his petition for post-conviction relief. The court denied these motions. Subsequently, Tapia filed a motion to withdraw his petition for post-conviction relief without prejudice. The court received this motion on May 19 – the day before the hearing – although Tapia's certificate of service stated that he mailed it on May 14. The post-conviction court orally denied Tapia's motion during the hearing.

. . . [T]he Court of Appeals reversed, concluding that the post-conviction court was required to allow Tapia to withdraw his petition for post-conviction relief without prejudice unless the State could show that it would be harmed by the delay. See Tapia v. State, 734 N.E.2d 307, 310 (Ind. Ct. App. 2000). We granted transfer, Tapia v. State, 734 N.E.2d 307 (Ind. 2000) (table), and now affirm the judgment of the post-conviction court.

. . . [T]he Court of Appeals analyzed whether the post-conviction court erred by denying Tapia the chance to withdraw without prejudice. Tapia, 734 N.E.2d at 310-11. The Court of Appeals analogized Tapia's argument to a civil plaintiff's motion for voluntary dismissal under Trial Rule 41(A)(2). Id. at 309. The Court of Appeals determined that such motions should be rejected only when the non-movant

> [W]ill suffer some prejudice other than the mere prospect of a second lawsuit. [Therefore] substantial prejudice to the defendant should be the test. Where substantial prejudice is lacking the district court should exercise its discretion by granting a motion for voluntary dismissal without prejudice. [Citation omitted.]

Finding that the State would have suffered no harm if the post-conviction court granted Tapia's motion, the Court of Appeals reversed. [Citation omitted.]

The types of motions at the heart of this case are primarily matters of trial court discretion, and appellate courts should review those matters only for an abuse of that discretion. As for the motion to withdraw that proved determinative in the Court of Appeals, the terms of Indiana Post-Conviction Rule 1(4)(c) give the trial court the discretion – but not a mandate – to allow the petitioner to withdraw the petition without prejudice: "[a]t any time prior to entry of judgment the court may grant leave to withdraw the petition." (emphasis added). Therefore the plain language of the Rule compels us to review the post-conviction court's actions in this regard under an abuse of discretion standard.

. . . .

Relying on cases determined under Indiana Trial Rule 41(A), the Court of Appeals concluded that a petitioner was entitled to withdraw a petition for post-conviction relief unless the State could make a "showing of prejudice." Tapia, 734 N.E.2d at 310. [Footnote omitted.] However, as discussed supra, the Post-Conviction Rule grants the post-conviction court discretion to determine whether to allow a petitioner to withdraw a petition. [Citation omitted.] While prejudice to the non-moving party is one indicia of an abuse of discretion, [footnote omitted] it is not a proxy for the post-conviction court's discretion in the face of plain language in the Rule to the contrary.

Applying the abuse of discretion standard, we conclude that the post-conviction court's refusal to allow Tapia to withdraw his petition was not "clearly against the logic and effect of the facts and circumstances before the court." Stroud, supra. Paramount among the "facts and circumstances" surrounding Tapia's motion to withdraw is that fact that Tapia made little effort to explain what he would gain by delaying the proceedings. Tapia asserted that he "recently discovered substantial errors which he verily believes warrant relief." Tapia did not explain what these errors were or why he could not develop evidence to support them in the four years since he filed his petition for post-conviction relief. [Footnote omitted.] The post-conviction court could balance what speculative benefit Tapia would derive from a delay against the costs to the court in wasted time, and conclude that Tapia was not entitled to withdraw his petition. [Footnote omitted.] . . .

. . . .

SHEPARD, C. J., and BOEHM, DICKSON, and RUCKER, JJ., concurred.

STEWART v. STATE, No. 49S00-0010-CR-587, ___ N.E.2d ___ (Ind. Aug. 29, 2001).
BOEHM, J.

Alfred Stewart, a juvenile, was convicted of felony murder and robbery. In this direct

appeal, Stewart contends that the trial court should have suppressed his confession to the police because it was taken in violation of Indiana Code section 31-32-5-1. We reverse the conviction and remand for a new trial.

. . . .

Indiana Code section 31-32-5-1 provides, in relevant part, that the state and federal constitutional rights of an unemancipated person under eighteen years of age may be waived only:

> (2) by the child's custodial parent, guardian, custodian, or guardian ad litem if:
> (A) that person knowingly and voluntarily waives the right;
> (B) that person has no interest adverse to the child;
> (C) meaningful consultation has occurred between that person and the child; and

(D) the child knowingly and voluntarily joins with the waiver.

Ind. Code § 31-32-5-1(2) (1998) (originally enacted as Indiana Code section 31-6-7-3 (1978)). The statute represents the legislature's agreement with this Court's conclusions in Lewis v. State, 259 Ind. 431, 439, 288 N.E.2d 138, 142 (Ind. 1972), that extra protections are necessary when juveniles are faced with the prospect of waiving their constitutional rights. The statute requires the participation of a "custodial parent" and prohibits a unilateral waiver of rights by the child. [Citation omitted.] The burden is on the State to show that such a waiver occurred beyond a reasonable doubt. [Citation omitted.]

. . . .

[T]he principal issue is whether Stewart's biological father qualifies as one of those necessary parties, namely a "custodial parent." The undisputed facts are: (1) Stewart was born out of wedlock; (2) a court award of custody neither appears in the record nor is claimed to exist by either the State or Stewart; and (3) Stewart did not live with his biological father. In light of the foregoing, we conclude that Stewart's father does not qualify as a "custodial parent."

. . . .

SHEPARD, C. J., and DICKSON, RUCKER, and SULLIVAN, JJ., concurred.

TURNER v. STATE, No. 49A02-0012-CR-769, ___ N.E.2d ___ (Ind. Ct. App. July 31, 2001).
[*Editor's Note: The following revised opinion was issued on August 17, 2001. The previous opinion, which has been withdrawn, was reported in Case Clips Vol. XXVIII, No. 25, p. 248.*]
NAJAM, J.

As for Turner's final argument, we conclude that the trial court abused its discretion when it imposed a $1,000 public defender reimbursement fee. Indiana Code Section 35-33-7-6(c) states:

> If the court finds that the person is able to pay part of the cost of representation by the assigned counsel, the court shall order the person to pay the following:
> (1) For a felony action, a fee of one hundred dollars ($100).[5]

Trial courts may deduct additional money to cover public defender costs from a defendant's posted cash bond pursuant to Indiana Code Section 35-33-8-3.2. See Obregon v. State, 703 N.E.2d 695, 696 (Ind. Ct. App. 1998). Such is not the case here, however, as Turner posted no bond and was incarcerated following his arrest through the conclusion of his trial.

In addition, we note that while Indiana Code Sections 33-9-11.5-6 and 33-19-2-3 grant trial courts the discretion to impose representation costs against a defendant in excess of one $100, those statutes do not apply in this instance. Indiana Code Section 33-9-11.5-6 applies only in those situations where "the court makes a finding of ability to pay the costs of representation," while Indiana Code Section 33-19-2-3 applies only to those defendants

that the court deems "not indigent." Here, the trial court found defendant indigent for the purposes of appointing a public defender and then renewed its indigency finding when it appointed pauper appellate counsel. The trial court never declared Turner "not indigent" or otherwise determined that he had the ability to pay the costs of representation. The only statutory means at the trial court's disposal for imposing costs on Turner was therefore Indiana Code Section 35-33-7-6(c), which caps such costs for a felony at $100.[6] Thus, the trial court exceeded its statutory authority when it assessed Turner a reimbursement fee of more than $100.

. . . .

BARNES and DARDEN, JJ., concurred.

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[5] We note that Indiana Code Section 35-33-7-6 contains no language requiring trial curts to conduct a separate indigency hearing before imposing fees, and we decline Turner's invitation to hold that such a hearing is necessary in order to impose fees under this statute.

[6] Although Indiana Code Section 35-33-7-6 contemplates that a court shall determine a defendant's indigency "[p]rior to the completion of the initial hearing," the statute does not require the trial court to order defendant to pay, at that point, the appropriate fee (either $50 or $100), if any. The court may, as it did in this case, wait until sentencing to impose such costs. Indeed, this result follows directly from the fact that section (d) of the statute allows a trial court to "review the finding of indigency at any time during the proceedings" and, presumably, to adjust or impose any contemplated fee in accordance with its indigency determination.

CIVIL LAW ISSUES

LIVINGSTON v. FAST CASH USA, INC., No. 94S00-0010-CQ-609, ___ N.E.2d ___ (Ind. Aug. 16, 2001).

RUCKER, J.

The certified question arises from numerous cases pending in the federal courts. A majority of the defendants are lenders who are in the business of making small, short-term, single-payment, consumer loans generally referred to as "payday" loans. Some of the defendants are collection agencies or attorneys who do not make loans but represent lenders in actions to collect from borrowers who have defaulted on their loan obligations. [Footnote omitted.] The loan amounts range from $50 to $400 and extend for a period of less than thirty days. Lenders contract for and receive as a finance charge an amount equal to or less than the minimum loan finance charge permitted by Indiana Code section 24-4.5-3-508(7). Plaintiffs are persons who have obtained loans from one or more Lenders.

Although the details vary from person to person as well as from lender to lender, typically a payday loan works as follows. The borrower applies for a small loan and gives the lender a post-dated check in the amount of the loan principal plus a finance charge. Depending on the lender, the finance charge varies from $15 to $33. In return, the lender gives the borrower a loan in cash with payment due in a short period of time, usually two weeks. When the loan becomes due, the borrower either repays the lender in cash the amount of the loan plus the finance charge, or the lender deposits the borrower's check. If the borrower lacks sufficient funds to pay the loan when due, then the borrower may obtain a new loan for another two weeks incurring another finance charge.

Acting on behalf of themselves and a putative class of borrowers, plaintiffs allege that Lenders violated Indiana law by contracting for and receiving the minimum loan finance charge permitted by Indiana Code section 24-4.5-3-508(7) when the finance charge exceeded the 36% annual percentage rate ("APR") specified in Indiana Code section 24-4.5-3-508(2) or the 72% APR specified in Indiana Code section 35-45-7-2. . . .

. . . .

We conclude that the minimum loan finance charges for supervised loans provided for in Indiana Code section 24-4.5-3-508(7) are limited by the maximum 36% APR allowed in Indiana Code section 24-4.5-3-508(2). We further conclude that minimum loan finance charges for supervised loans provided for in Indiana Code section 24-4.5-3-508(7) are limited also by Indiana Code section 35-45-7-2.

DICKSON and SULLIVAN, JJ., concurred.

BOEHM, J., filed a separate written opinion in which he concurred, in part, as follows:

I agree with the majority's answer to the certified question. . . .

. . . .

The only conclusion I can reach from this is that the court is quite clearly correct in concluding that payday loans were not contemplated at all by the drafters of the IUCCC. . . .

. . . .

[I] think the logic of the defendants' position produces demonstrably absurd results. The same arguments advanced to justify a $33 minimum charge for a two-week loan of $100 equally justify a $33 charge for a two-minute loan of $1. . . .

. . . .

[I]t is very clear that some forms of lending practices are prohibited, and the only question is whether payday loans are among the practices proscribed by the statute. For the reasons given above, I conclude they are. I agree that the "multiple contracts" provision referred to by the Chief Justice may also be relevant to the ultimate issues in this case, but because the federal court declined to certify that question, I express no view as to it.

SHEPARD, C. J., filed a separate written opinion in which he dissented, in part , as follows:

I think subsection 508(2) limiting annual interest and subsection 508(7) permitting a minimum finance charge were adopted by the legislature on the premise that the two would work together like this: a lender can charge no more than 36% per year, but if the loan period is so short or the loan so small that this rate might produce just a few dollars, a minimum of $33 may be charged. This harmonizes both provisions by treating subsection 508(7) as an exception to subsection 508(2), and it makes $33 a true "minimum loan finance charge" using the common meaning of the words.

. . . .

It has been awhile since we last encountered a statute in such serious need of revision. Our federal cousins might take comfort in knowing that, like them, we found the task of parsing its various provisions very difficult (but had nowhere else to send out for help).

DOW CHEM. CO. v. EBLING, No. 22S05-0008-CV-481, ___ N.E.2d ___ (Ind. Aug. 23, 2001).

DICKSON, J.

In this interlocutory appeal, defendants Dow Chemical Company, Dowelanco n/k/a Dow Agrosciences LLC, Eli Lilly & Company, Rofan Services, Inc., and Epco, Inc. (herein collectively referred to as Dow); Louisville Chemical Company, Inc. (LCC); and Affordable Pest Control, Inc. (Affordable); challenged the denial of their motions for summary judgment in a damage action brought by plaintiffs Todd and Cynthia Ebling alleging that their children were injured as a result of exposure to pesticides manufactured and applied by the defendants. Finding primarily that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) [footnote omitted] preempted the plaintiffs' claims based on failure to warn and failure to disseminate information to commercial applicators for distribution directly to the persons whose residences are to be sprayed, the Court of Appeals concluded that the defendants were entitled to summary judgment as to some, but not all, of the plaintiffs' claims against each defendant. Dow Chemical Co. v. Ebeling, 723 N.E.2d 881 (Ind. Ct. App. 2000). In response to the plaintiffs' request for our review of the FIFRA preemption issue, we granted transfer and hold that FIFRA does not preempt the plaintiffs' failure to warn claims against Affordable. In all other respects, we summarily affirm the Court of Appeals. [Footnote omitted.]

. . . .

The law is fairly settled that when a pesticide *manufacturer* "places EPA-approved warnings on the label and packaging of its products, its duty to warn is satisfied, and the adequate warning issue ends." Papas v. Upjohn Co., 985 F.2d 516, 519 (11th Cir. 1993). Because of the absence of an affirmative FIFRA labeling requirement for *applicators*, however, we find that the alleged state tort law duty imposed upon applicators to convey the information in the EPA-approved warnings to persons placed at risk does not constitute a requirement additional to or different from those imposed by FIFRA.

. . . .

We hold that FIFRA preemption does not apply to preclude the plaintiffs' action against Affordable for its failure to warn the plaintiffs by providing them with the FDA-approved

label warning information. The trial court is affirmed in its denial of summary judgment to Affordable on preemption. . . .

SHEPARD, C. J., and BOEHM, RUCKER and SULLIVAN, JJ., concurred.

BOONE COUNTY AREA PLANNING COMM'N v. SHELBURNE, No. 06A04-0010-CV-455, ___ N.E.2d ___ (Ind. Ct. App. Aug. 17, 2001).

BAILEY, J.

The Boone County Area Plan Commission ("Plan Commission") appeals an order compelling it to certify a determination of "no recommendation" to the Board of Commissioners of Boone County ("Board of Commissioners") upon the application of Delores Shelburne, Clayton Shelburne and The Lewis Group, Inc. (collectively, "The Lewis Group") for a Zone Map Amendment. We affirm.

. . . .

Initially, the parties disagree as to the specific duty imposed upon the Plan Commission by Indiana Code section 36-7-4-608(b). The Plan Commission claims it is required to initiate a public hearing within 60 days, but may continue the hearing as necessary to obtain information pertinent to a zoning map amendment. The Lewis Group contends that the role of the Plan Commission is "purely advisory" and should be concluded within 60 days. In essence, this is the construction of Indiana Code section 36-7-4-608(b) adopted by the trial court. However, the plain language of the statute leads to a contrary conclusion.

. . . Clearly, the Plan Commission is required to hold a public hearing on the merits of the proposal within 60 days. However, this is not equivalent to a mandate to obtain and evaluate all pertinent information, reach a decision and convey the recommendation to the legislative body within 60 days. Moreover, Indiana Code section 36-7-4-604(b)(8) specifically contemplates that the hearing may be continued "from time to time." Indiana Code section 36-7-4-604(d) contemplates that multiple hearings may be held where the population distribution renders this desirable.

. . . .

The Plan Commission was not statutorily required to fulfill all its duties and forward its recommendation within 60 days. Nevertheless, it is clear that the Plan Commission conducted no hearing on the merits of The Lewis Group's petition within the 60-day period prescribed by statute. Therefore, we turn to the question of whether the trial court's remedy for non-compliance exceeded its authority.

. . . The Plan Commission alleges that the trial court usurped the advisory role delegated to the Plan Commission in Indiana Code section 36-7-4-602(c). [Footnote omitted.] The Lewis Group responds that the trial court, in the absence of express statutory authorization, exercised its broad equitable powers to fashion a remedy to prevent the Plan Commission from abusing its advisory role by needlessly prolonging its decision-making process. [Footnote omitted.]

. . . .

We agree that, had the Plan Commission elected to reach a decision, the decision-making process would have involved an evaluative process that is not merely ministerial. However, the Plan Commission essentially abrogated the role of advisory decision-maker. At the October 4, 2000 hearing, counsel for the Plan Commission warned that the Plan Commission's position on appeal could be adversely affected if it demonstrated its ability to reach a decision. Thereafter, no decision ensued.

In the face of repeated delays, and apparent reluctance on the part of the Plan Commission to reach a decision and certify its recommendation to the Board of Commissioners, the trial court ordered the Plan Commission to certify a "no recommendation" decision to the Board of Commissioners. However, the trial court did not

mandate either approval or disapproval of the petition, and thus offered no opinion on the merits of The Lewis Group's petition. . . .

The effect of the trial court's order is that the Board of Commissioners, the legislative body ultimately responsible for a rezoning decision in Boone County, will be able to address the merits of the zone map amendment petition on an expeditious basis, clearly the intent of the legislature in the enactment of the Local Plan and Zoning Act, which assigns the Plan Commission a preliminary and advisory role. Under the circumstances surrounding the inability of the Plan Commission to timely reach a recommendation, we do not conclude that the trial court exceeded its jurisdiction and usurped the role of the Plan Commission.

. . . .

MATHIAS, J., concurred.

BAKER, J., filed a separate written opinion in which he concurred and in which he dissented, in part, as follows:

I agree with the majority that IND. CODE § 36-7-4-608(b) requires the Plan Commission to hold a hearing within sixty days on a petition to amend a zoning map. I also agree that the Plan Commission failed to hold such a hearing within sixty days and that the trial court had the authority to order the Plan Commission to comply with the statute. [Footnote omitted.] However, I believe the trial court overstepped its bounds by requiring the Plan Commission to deliberate and make a recommendation within thirty days of the hearing. When the trial court mandated that a "no recommendation" be forwarded, it substituted its judgment for that of the Plan Commission's.

. . . .

KOSTIDIS v. GEN. CINEMA CORP. OF INDIANA, No. 64A05-0012-CV-521, ___ N.E.2d ___ (Ind. Ct. App. Aug. 17, 2001).

BAILEY, J.

The court instructed the jury over Kostidis's objection as follows:

> I instruct you that the duty imposed upon the Defendants did not require them to use every possible precaution to avoid the Plaintiff's injury; nor that the Defendants should have employed any particular means, which may appear after the accident, would have avoided it; nor were the Defendants required to make accidents impossible. The Defendants were only required to use such reasonable precaution to prevent the accident as would have been adopted by ordinarily prudent persons under the circumstances as they appeared prior to the accident.

(Supp. R. 17.) The court further charged the jury that:

> Negligence on the part of the defendants may not be inferred merely because Plaintiff was injured on Defendants' property, but must be proven by the Plaintiff by a preponderance of the evidence.
>
> An owner of [sic] occupier of land is not the insurer of its customer's safety, but owes the duty to use ordinary care to maintain its property in a reasonably safe condition for the use of its customers.

(Supp. R. 19.) Kostidis claims that these charges amounted to a forbidden "pure accident" instruction. We do not agree.

Jury instructions stating that a defendant is not liable for a plaintiff's damages if those damages are the result of a "mere," "pure," or "unavoidable" accident have been prohibited in Indiana since our supreme court decided Miller v. Alvey, 246 Ind. 560, 207 N.E.2d 633, 636-637 (1965). . . . [W]hen determining whether a particular charge is a prohibited "mere accident" instruction, our focus is on "whether the jury is likely to be misled by the use of the word 'accident' or by similar language." Id. at 1235. An instruction containing

the term "accident" is not necessarily erroneous if it addresses the burden of proof or proximate causation. Indianapolis Athletic Club, Inc., 709 N.E.2d 1070, 1076 (Ind. Ct. App. 1999) (citing Dunlap v. Goldwin, 425 N.E.2d 724, 726 (Ind. Ct. App. 1981)), trans. denied. Reversible error should be found, however, where the instruction addresses the issue of liability, and suggests that a plaintiff should not recover for damages resulting from an accidental event. Id.

. . . Athough the first instruction at issue used the term "accident," it did not mention the word "liability." Both instructions, however, spoke to the defendants' duties of care. In particular, the instructions provided that the defendants were not "required to make accidents impossible," and that the defendants had no duty to ensure Kostidis's safety. (Supp. R. 17.) The question of duty is a component of the broader concept of liability for negligence, and standing alone, these portions of the instructions could give jurors the impression that the defendants could avoid liability if Kostidis's fall was an "accident." However, it is not likely that the instructions here misled the jury into thinking that the defendants would not be liable for a "mere accident," because they also clearly and correctly told the jurors that the defendants were "required to use such reasonable precaution to prevent the accident as would have been adopted by ordinarily prudent persons under the circumstances . . ." (Supp. R. 17), and that the defendants owed "the duty to use ordinary care to maintain [the] property in a reasonably safe condition for the use of its customers." (Supp. R. 19.) These statements clearly indicated to the jury that the defendants could be liable for Kostidis's fall even if the fall was an "accident," and were sufficient to counterbalance any confusion engendered by other portions of the instructions. The fact that the jury returned a verdict apportioning 51 percent of the fault to Kostidis and 49 percent to the defendants further supports our conclusion that the jury was not likely misled into thinking that Kostidis's fall was the result of a "mere accident," or that the defendants would be relieved of all liability if that were the case.

. . . .

BAKER and MATHIAS, JJ., concurred.

MILLER, v. MARTIG, No. 33A01-0009-CV-326, ___ N.E.2d ___ (Ind. Ct. App. Aug. 27, 2001).
BAKER, J.

[T]he Millers assert that a physician-patient relationship existed and the standard of care was breached when Dr. Martig, the "on-call" physician at the hospital, informed Nancy that he would not administer a spinal narcotic to her because he was not qualified to do so.

On May 21, 1994, Nancy was an obstetrical patient at the Henry County Memorial Hospital (Hospital) under the care of Dr. Nancy Griffith. On that day, she was admitted to the Hospital for the inducement of labor. During that period, Dr. Griffith made an order for Dr. Martig, the "on call" anesthesiologist at the Hospital, to consult with Nancy regarding pain control. In accordance with the Hospital's bylaws, Dr. Martig had a contractual duty to be available when needed by the Hospital's patients. Hospital policy required its "on call"

staff to be within thirty minutes of the building.

When Dr. Martig first consulted with Nancy, he explained to her that he did not administer epidurals [footnote omitted] because he lacked proper training and experience regarding that type of pain management. Thus, he told Nancy that he "could not accept her case, and that she would need to consult further with Dr. Griffith regarding obstetrical pain management." [Citation to Record omitted.] . . . Dr. Martig then left the hospital room and retired to the physician's lounge at the Hospital to sleep. Pursuant to the Hospital's policy, Dr. Martig was to inform the Hospital's switchboard operator as to his whereabouts. Dr. Martig testified that he notified the nurses of his location but that his beeper was not functioning properly.

. . . .

Dr. Griffith arrived at Nancy's hospital room at approximately 11:30 p.m. and performed a pelvic examination. The exam revealed that Nancy had a prolapsed cord that qualified as an obstetrical emergency. Thus, Dr. Griffith ordered that a Cesarean section (hereinafter, C-section) be performed. A nurse then paged Dr. Martig in an attempt to inform him of the situation. Because Dr. Martig could not be located, Dr. Griffith and one of the Hospital residents performed the C-section without an anesthetic and delivered the baby.

As a result of the incident, the Millers filed a proposed complaint with the Indiana Department of Insurance on April 30, 1996, alleging that Dr. Martig was negligent because he failed to provide anesthetic services to Nancy. Thereafter, Dr. Martig moved for summary judgment which the trial court subsequently granted. The trial court determined that a physician-patient relationship never existed between Nancy and Dr. Martig. . . .

. . . .

[W]e note that the Millers have devoted a substantial portion of their appellate brief in support of the notion that a physician-patient relationship was established when Dr. Martig, as the on call anesthesiologist for the Hospital, informed Nancy that he could not administer spinal narcotics to her. The parties concede, and we agree, that there are no reported cases in Indiana as to when and if a physician-patient relationship may be established with respect to an on-call physician absent a contractual relationship between the physician and patient. We note, however, that this issue is left for another day, inasmuch as counsel for the Millers conceded or "clarified" at oral argument before this court that they are not seeking to impose liability upon Dr. Martig merely because of his on-call status at the Hospital. Rather, the Millers contend that the disputed facts presented in this case gave rise to the existence of a physician-patient relationship between Nancy and Dr. Miller when he initially consulted with her. . . .

. . . .

Here, Dr. Martig made no recommendation to Nancy regarding her condition or as to any course of treatment. Moreover, Dr. Martig did not participate in any course of treatment and did nothing to support an implication that he consented to the establishment of a physician-patient relationship. To the contrary, Dr. Martig informed Nancy that he would not take her case. As a result, no physician-patient relationship was established, and summary judgment was properly entered for Dr. Martig.

. . . .

FRIEDLANDER, J., concurred.

RILEY, J., filed a separate written opinion in which she dissented, in part, as follows:

I respectfully dissent. . . .

. . . .

Dr. Martig's presence as an "on-call" anesthesiologist created a false sense of security that an anesthesiologist would be available to treat emergency obstetrical situations on

which Mrs. Miller relied. . . . Given the uncontroverted evidence of the hospital by-law requirements, Mrs. Miller had a reasonable expectation of a contract between the hospital and Dr. Martig requiring him to provide emergency room treatment when on call.

. . . .

Where the hospital has exercised reasonable care in administering its emergency room procedures, but the on-call physician has failed to exercise reasonable care in undertaking his attendant duties, the liability falls on the physician as the party in the best position to prevent the negligent act.

. . . .

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CASE CLIPS TRANSFER TABLE

August 31, 2001

This table lists recent grants of transfer by the Indiana Supreme Court for published decisions of the Court of Appeals. It includes Judicial Center summaries of the opinions of the Court of Appeals vacated by the transfers and of the Supreme Court's opinions on transfer.

A CASE CLIPS transfer information feature was suggested by the Justices of the Indiana Supreme Court in response to trial court requests for more accessible information about grants of transfer. The table is prepared with assistance from the Supreme Court Administrator's Office, which sends the Judicial Center a weekly list of transfer grants.

A grant of transfer vacates the opinion of the Court of Appeals: "[i]f transfer be granted, the judgment and opinion or memorandum decision of the Court of Appeals shall thereupon be vacated and held for naught, except as to any portion thereof which is expressly adopted and incorporated by reference by the Supreme Court, and further, except where summarily affirmed by the Supreme Court." Indiana Appellate Rule 11(B)(3).

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Owens Corning Fiberglass v. Cobb	714 N.E.2d 295 49A04-9801-CV-46	Defense should have received summary judgment as plaintiff showed only that he might have been exposed to its asbestos	01-19-00	
Felsher v. City of Evansville	727 N.E.2d 783 82A04-9910-CV-455	University was entitled to bring claim for invasion of privacy; professor properly enjoined from appropriating "likenesses" of university and officials; professor's actions and behavior did not eliminate need for injunction; and injunction was not overbroad..	8-15-00	
Dow Chemical v. Ebling	723 N.E.2d 881 22A05-9812-CV-625	State law claims against pesticide manufacturer, with exception of negligent design, were preempted by federal FIFRA pesticide control act; pest control company provided a service and owed duty of care to apartment dwellers, precluding summary judgment.	8-15-00	8-23-01. No. 22S05-0008-CV-481. Federal law does not preempt claim against pesticide applicator.
South Gibson School Board v. Sollman	728 N.E.2d 909 26A01-9906-CV-222	Denying student credit for all course-work he performed in the semester in which he was expelled was arbitrary and capricious; summer school is not included within the period of expulsion which may be imposed for conduct occurring in the first semester	9-14-00	
Moberly v. Day	730 N.E.2d 768 07A01-9906-CV-216	Fact issue as to whether son-in-law was employee or independent contractor precluded a summary judgment declaring no liability under respondeat superior theory; and Comparative Fault has abrogated fellow servant doctrine.	10-24-00	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Shambaugh and Koorsen v. Carlisle	730 N.E.2d 796 02A03-9908-CV-325	Elevator passenger who was injured when elevator stopped and reversed directions after receiving false fire alarm signal brought negligence action against contractors that installed electrical wiring and fire alarm system in building. Held: contractors did not have control of elevator at time of accident and thus could not be held liable under doctrine of res ipsa loquitur.		
S.T. v. State	733 N.E.2d 937 20A03-9912-JV-480	No ineffective assistance when (1) defense counsel failed to move to exclude two police witnesses due to state's failure to file witness list in compliance with local rule and (2) failed to show cause for defense failure to file its witness list under local rule with result that both defense witnesses were excluded on state's motion	10-24-00	
Tapia v. State	734 N.E.2d 307 45A03-9908-PC-304	Reverses refusal to allow PCR amendment sought 2 weeks prior to hearing or to allow withdrawal of petition without prejudice	11-17-00	8-20-01. No. 45S03-0011-PC-708. t. of Appeals Opinion wrongly holds withdrawal with prejudice is <u>required</u> unless state shows prejudice.
Tincher v. Davidson	731 N.E.2d 485 49A05-9912-CV-534	Affirms mistrial based on jury's failures to make comparative fault damage calculations correctly	11-22-00	
Brown v. Branch	733 N.E.2d 17 07A04-9907-CV-339	Oral promise to give house to girlfriend if she moved back not within the statute of frauds.	11-22-00	
New Castle Lodge v. St. Board of Tx. Comm.	733 N.E.2d 36 49T10-9701-TA-113	Fraternal organization which owned lodge building was entitled to partial property tax exemption	11-22-00	
Gallant Ins. Co. v. Isaac	732 N.E.2d 1262 49A02-0001-CV-56	Insurer 's agent had "inherent authority" to bind insurer, applying case holding corp. president had inherent authority to bind corp. to contract	11-22-00	7-23-01. 751 N.E.2d 672. Inherent authority not applicable, but agent had apparent authority to bind corporation.

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Reeder v. State	732 N.E.2d 1246 49A05-9909-CV-416	When filed, expert's affidavit sufficed to avoid summary judgment but affiant's death after the filing made his affidavit inadmissible and hence summary judgment properly granted.	1-11-01	
Holley v. Childress	730 N.E.2d 743 67A05-9905-JV-321	Facts did not suffice to overcome presumption non-custodial parent was fit so that temporary guardianship for deceased custodial parent's new spouse was error.	1-11-01	
Cannon v. Cannon	729 N.E.2d 1043 49A05-9908-CV-366	Affirms decision to deny maintenance for spouse with ailments but who generated income with garage sales	1-11-01	
Davidson v. State	735 N.E.2d 325 22A01-0004-PC-116	Ineffective assistance for counsel not to have demanded mandatory severance of charges of "same or similar character" when failure to do so resulted in court's having discretion to order consecutive sentences.	1-17-01	
Leshore v. State	739 N.E.2d 1075 02A03-0007-CR-234	(1) Writ of body attachment on which police detained defendant was invalid on its face for failure to include bail or escrow amount, and (2) defendant's flight from detention under the writ did not amount to escape.	1-29-01	
Mercantile Nat'l Bank v. First Builders	732 N.E.2d 1287 45A03-9904-CV-132	materialman's notice to owner of intent to hold personally liable for material furnished contractor, IC 32-8-3-9, sufficed even though it was filed after summary judgment had been requested but not yet entered on initial complaint for mechanic's lien foreclosure	2-09-01	
State Farm Fire & Casualty v. T.B.	728 N.E.2d 919 53A01-9908-CV-266	(1) insurer acted at its own peril in electing not to defend under reservation of rights or seek declaratory judgment that it had no duty to defend; (2) insurer was collaterally estopped from asserting defense of childcare exclusion that was addressed in consent judgment; (3) exception to child care exclusion applied in any event; and (4) insurer's liability was limited to $300,000 plus post-judgment interest on entire amount of judgment until payment of its limits.	2-09-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Merritt v. Evansville Vanderburgh School Corp	735 N.E.2d 269 82A01-912-CV-421	error to refuse to excuse for cause two venire persons employed by defendant even though they asserted they could nonetheless be impartial and attentive	2-09-01	
IDEM v. RLG, Inc	735 N.E.2d 290 27A02-9909-CV-646	the weight of authority requires some evidence of knowledge, action, or inaction by a corporate officer before personal liability for public health law violations may be imposed. Personal liability may not be imposed based solely upon a corporate officer's title.	2-09-01	
State v. Gerschoffer	738 N.E.2d 713 72A05-0003-CR0116	Sobriety checkpoint searches are prohibited by Indiana Constitution.	2-14-01	
Healthscript, Inc. v. State	724 N.E.2d 265, *rhrg.* 740 N.E.2d 562 49A05-9908-CR-370	Medicare fraud crimes do not include violations of state administrative regulations.	2-14-01	
Vadas v. Vadas	728 N.E.2d 250 45A04-9901-CV-18	Husband's father, whom wife sought to join, was never served (wife gave husband's attorney motion to join father) but is held to have submitted to divorce court's jurisdiction by appearing as witness; since father was joined, does not reach dispute in cases whether property titled to third parties not joined may be in the marital estate.	3-01-01	
N.D.F. v. State	735 N.E.2d 321 No. 49A02-0003-JV-164	Juvenile determinate sentencing statute was intended to incorporate adult habitual criminal offender sequential requirements for the two "prior unrelated delinquency adjudications"; thus finding of two prior adjudications, without finding or evidence of habitual offender-type sequence, was error	3-02-01	
Robertson v. State	740 N.E.2d 574 49A02-0006-CR-383	Hallway outside defendant's apartment was part of his "dwelling" for purposes of handgun license statute.	3-09-01	
Bradley v. City of New Castle	730 N.E.2d 771 33A01-9807-CV-281	Extent of changes to plan made in proceeding for remonstrance to annexation violated annexation fiscal plan requirement.	4-06-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
King v. Northeast Security	732 N.E.2d 824 49A02-9907-CV-498	School had common law duty to protect student from criminal violence in its parking lot; security company with parking lot contract not liable to student under third party beneficiary rationale.	4-06-01	
State v. Hammond	737 N.E.2d 425 41A04-0003-PC-126	Amendment of driving while suspended statute to require "validly" suspended license is properly applied to offense committed prior to amendment, which made "ameliorative" change to substantive crime intended to avoid supreme court's construction of statute as in effect of time of offense.	4-06-01	
Dewitt v. State	739 N.E.2d 189	Trial court's failure to advise a defendant of his *Boykin* rights (trial by jury, confrontation, and privilege against self-incrimination) requires vacation of his guilty plea	4-26-01	
Buchanan v. State	742 N.E.2d 1018 18A04-0004-CR-167	Admission of pornographic material picturing children taken from child-molesting defendant's home was error under Ev. Rule 404(b).		
McCary v. State	739 N.E.2d 193 49A02-0004-PC-226	Failure to interview policeman/probable-cause-affiant, when interview would have produced exculpatory evidence, was ineffective assistance of trial. Counsel on direct appeal was ineffective for noting issue but failing to make record of it via p.c. proceeding while raising ineffective assistance in other respects. Post-conviction court erred in holding res judicata applied under *Woods v. State* holding handed down after direct appeal..	5-10-01	
Equicor Development, Inc. v. Westfield-Washington Township Plan Comm.	732 N.E.2d 215 No. 29A02-9909-CV-661	Plan Commission denial of subdivision approval was arbitrary and capricious, notwithstanding it was supported by evidence, due to Commission's prior approvals of numerous subdivision having same defect.	5-10-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Martin v. State	744 N.E.2d 574 No 45A05-0009-PC-379	Finds ineffective assistance of appellate counsel for waiving issue of supplemental instruction given during deliberations on accomplice liability.	6-14-01	
Segura v. State	729 N.E.2d594 No. 10A01-9906-PC-218	Notes possible effect of Williams v. Taylor, 529 U.S. 362 (2000) on Indiana cases on ineffective assistance of counsel for failure to advise correctly of penal consequences of guilty plea, while affirming conviction.	6-05-01	6-26-01. 749 N.E.2d 496. Assesses effect of federal decisions on Indiana caselaw and concludes "in the case of claims related to a defense or failure to mitigate a penalty, it must be shown that there is a reasonable probability that a more favorable result would have obtained in a competently run trial. However, for claims relating to penal consequences, a petitioner must establish, by objective facts, circumstances that support the conclusion that counsel's errors in advice as to penal consequences were material to the decision to plead."
Catt v. Board of Comm'rs of Knox County	736 N.E.2d 341 (Ind. Ct. App. 2000) No. 42A01-9911-CV-396	County had duty of reasonable care to public to keep road in safe condition, and County's knowledge of repeated washs-outs of culvert and its continued failure to repair meant that wash-out due to rain was not a "temporary condition" giving County immunity.	6-14-01	
Ind. Dep't of Environmental Mgt. v. Bourbon Mini Mart, Inc.	741 N.E.2d 361 No. 50A03-9912-CV-476	(1) third-party plaintiffs were collaterally estopped from pursuing indemnity claim against automobile dealership; (2) third-party plaintiffs were collaterally estopped from pursuing indemnity claim against gasoline supplier pursuant to pre-amended version of state Underground Storage Tank (UST) laws; (3) amendment to state UST laws, which eliminated requirement that party seeking contribution toward remediation be faultless in causing leak, did not apply retroactively so as to allow contribution for response costs that were incurred before its effective date; and (4) third-party plaintiffs' action against gasoline supplier to recover ongoing remediation costs was not time barred.	6-14-01	
In re Ordinance No. X-03-96	744 N.E.2d 996 02A05-0002-CV-77	Annexation fiscal plan must have noncapital services estimates from a year after annexation and capital improvement estimates from three years after annexation.	7-18-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Corr v. Schultz	743 N.E.2d 1194 71A03-0006-CV-216	Construes uninsured motorist statutes to require comparison of what negligent party's insurer actually pays out with amount of insured's uninsured coverage; rejects prior Court of Appeals decision, *Sanders*, 644 N.E.2d 884, that uninsured statutes use comparison of negligent party's liability limits to uninsured coverage limit ("policy limits to policy limits" comparison); notes that not-for-publication decision from same accident, *Corr v. American Family Insurance*, used *Sanders* to hold that the correct analysis was to "compare the $600,000 per accident bodily injury liability limit under the two policies covering Balderas [negligent driver] to the $600,000 per accident underinsured motor vehicle limit of the policies under which Janel [Corr] was an insured; transfer also granted 7-18-01 in this unreported *Corr* case.	7-18-01	
Buckalew v. Buckalew	744 N.E.2d 504 34A05-0004-CV-174	Interprets local rule "no final hearing may be scheduled and no decree of dissolution of marriage or legal separation shall be entered unless and until the prescribed [financial] disclosure form is filed" to be "jurisdictional" so that trial court which made the rule had no authority to conduct a hearing or enter a decree without the required disclosure forms or a waiver by both parties.	7-18-01	
Friedline v. Shelby Insurance Co.	739 N.E.2d 178 71A03-0004-CV-132	Applies Indiana Supreme Court cases finding ambiguity in liability policies' exclusions for "sudden and accidental" and "pollutant" as applied to gasoline to hold that "pollutants" exclusion as applied to carpet installation substances was ambiguous and that insurance company's refusal to defend, made with knowledge of these Supreme Court ambiguity decisions, was in bad faith.	7-18-01	
St. Vincent Hospital v. Steele	742 N.E.2d 1029 34A02-0005-CV-294	IC 22-2-5-2 Wage Payment Statute requires not only payment of wages at the usual frequency (e.g., each week, etc.) but also in the correct amount, so Hospital which relied on federal legislation and federal regulatory interpretation for its refusal to pay physician contract compensation amount was liable for attorney fees and liquidated damages under Statute.	7-18-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Smith v. State	748 N.E.2d 895 29A02-00100PC-640	Error to find PCR laches when petition was filed within 27 days of sentencing and all ensuing delays due to Public Defender; guilty plea to six theft counts, for stealing a single checkbook containing the six checks, was unintelligent due to counsel's failure to advise of "single larceny" rule; the theft of the checkbook and ensuing deposits of six forged checks at six different branches of the same bank in the same county "within a matter of hours" were a "single episode of criminal conduct" subject to limits on consecutive sentencing and counsel's failure to discuss the single episode limit also rendered plea unintelligent.	7-19-01	
Martin v. State	748 N.E.2d 428 03A01-0012-PC-412	Holds that no credit for time served is earned by one on probation as a condition of probation, distinguishing *Dishroon v. State* noting 2001 amendment providing for such credit is inapplicable.	8-10-01	
State Bd. of Tax Comm'rs v. Garcia	743 N.E.2d 817 (Tax Ct. 2001) 71T10-9809-TA-104	Calculation by which Grade A-6 assessment was reached was not supported by regulations and hence was arbitrary and capricious. Swimming pool assessment as "A" rather than "G" was likewise outside regulations and reversed.	8-13-01	
Dunson v. Dunson	744 N.E.2d 960 (Ind. Ct. App. 2001) 34A02-0006-CV-375	Construes emancipation statute to require only that child not be under the care or control of either parent without any requirement he also be able to support himself without parental assistance.	8-13-01	
State v. Fulkrod	735 N.E.2d 851 48A02-003-CR-176	Sentence modification after 5 years over prosecutor's objection was not authorized. *Pannarale v. State*, 638 N.E.2d 1247 (Ind. 1994) is inapposite, as the statute on which it was based was repealed in 1999, so that under modification statute 35-38-1-17 prosecutor's agreement was required.	8-23-01	48A02-0003-CR-176. Under *Pannarale v. State*, 638 N.E.2d 1247 (Ind. 1994) a judge may modify a plea bargained sentence within plea bargain parameters only when modification is permissible "pursuant to the statute" (emphasis in opinion); as present statute requires prosecutor's agreement, modification was unauthorized in this case.
D'Paffo v. State	749 N.E.2d 1235 (Ind. Ct. App. 2001) 28A004-0010-CR-442	Child molesting instruction's omission of element of intent to gratify sexual desires when touching was fundamental error, not waived by failure of appellant to object, notwithstanding defense that victim was never touched at all. When witnesses had been cross-examined and given chances to explain prior inconsistent statements, the statements themselves were properly excluded as impeachment, Evidence Rule 613.	8-24-01	